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MAY - 6 2002

Vic Jackson

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May 6, 2002

 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

via Hand Delivery

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 Re: Comments on Initial Regulatory Flexibility Analysis
of Notice of Proposed Rule Making, WT Docket 02-55
In the Matter of Improving Public Safety Communications
in the 800 MHz Band/Consolidating the 900 MHz Industrial/Land
Transportation and Business Pool Channels

Dear Sirs:

We represent the telecommunication interests of Small Business in Telecommunications (SBT). SBT is a non-profit association of hundreds of small businesses. SBT's members

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operate hundreds of private carrier radio systems, many on the 800 and 900 MHz bands. Insofar as its members are acutely interested in the outcome of the above referenced proceeding, SBT hereby submits its comments regarding the Initial Regulatory Flexibility Analysis of the Notice of Proposed Rule Making.

To comply with the filing requirements announced in the NPRM, Supreme encloses the original copy of its comments herein, along with six copies thereof. The original comments and four copies should be delivered to William F. Caton. One copy should be provided to Qualex International, and one copy should be provided to Michael J. Wilhelm. Please feel free to contact us should there be any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Benjamin J. Aron", with a long horizontal flourish extending to the right.

Benjamin J. Aron

enclosure

cc: Laura Smith

BJA:cfh

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Improving Public Safety Communications in)
the 800 MHz Band)

WT Docket No. 02-55

Consolidating the 900 MHz Industrial/Land)
Transportation and Business Pool Channels)

**Comments of Small Business in Telecommunications
on the Initial Regulatory Flexibility Analysis of the
Notice of Proposed Rulemaking**

SUMMARY

Small Business in Telecommunications (SBT) is a non-profit association of hundreds of independent businesses, including CMRS carriers, which might be affected by rules arising from the instant Notice of Proposed Rule Making (NPRM). SBT feels that the Commission has not complied with the requirements of the Regulatory Flexibility Act (RFA) in drafting the Initial Regulatory Flexibility Analysis (IRFA) attached to the NPRM. SBT provides comments on the failure of the IRFA to comply with the requirements of the RFA.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Improving Public Safety Communications in
the 800 MHz Band

Consolidating the 900 MHz Industrial/Land
Transportation and Business Pool Channels

WT Docket No. 02-55

**Comments of Small Business in Telecommunications
on the Initial Regulatory Flexibility Analysis of the
Notice of Proposed Rulemaking**

Small Business in Telecommunications (SBT) hereby respectfully submits these Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the Initial Regulatory Flexibility Analysis (“IRFA”)¹ for its *Notice of Proposed Rulemaking* (“NPRM”) in the above-captioned proceeding.

SBT is a non-profit association of hundreds of independent businesses, including CMRS carriers, which might be affected by rules arising from the instant NPRM, specifically EA licensees and incumbent licensees within the 800 MHz band. SBT’s members span the use of private radio spectrum for operation of private carrier systems, community repeaters, specialized mobile radio (SMR), paging, microwave and a host of other services. Its members provide radios for customers’ design and operation of private internal and small government entity systems, and provide shared radio service which is customized for the purpose of serving the unique needs of individual business and industrial radio users. SBT estimates that the number of customers of commercial services provided by its membership is in the hundreds of thousands,

¹ NPRM Appendix Two, Initial Regulatory Flexibility Analysis.

while its members also supply equipment to tens of thousands of private radio users, wherein small businesses predominate and small government entities are included. Accordingly, SBT is vitally interested in regulatory flexibility in this matter, not only on behalf of its own members but also on behalf of its members' clients. Those small businesses and small government entities look to the Regulatory Flexibility Act of 1980² ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) and Subtitle II of the Contract with America Advancement Act³ (collectively, "RFA"), for protection of their interests. SBT appreciates this opportunity to provide comment on the IRFA of this NPRM.

As a commenter on the IRFA in this proceeding, SBT offers its assistance to the Commission to consider the needs of small telecommunications businesses, their owners and their employees. They depend on the Commission to provide continued opportunities to expand and to compete, as does the broader universe of small business and small government telecommunications users that utilizes equipment and services.

RFA Requirements

Under Section 603(a) of the RFA, each IRFA is required to describe the impact of a rulemaking on small entities.

Under Section 603(b) of the RFA, each IRFA is required to address: (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed

² Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

³ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (5) an identification, to the extent possible, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

Under Section 603(c) of the RFA, each IRFA must also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposal on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule or any part of the rule for small entities.

The IRFA's Description of the Impact on Small Entities

The IRFA in this Proceeding does not describe the significant economic impact on small entities of this NPRM — nor any potential impact. The requirement to describe any significant economic impact of a rule or proposed rule upon small entities is mandatory under RFA Section 603(a) and fulfilling this requirement is a central element of an agency's compliance with the RFA. This is *not* a requirement that can be deferred to a Final Regulatory Flexibility Analysis ("FRFA"). However, the Commission's omission of this analysis is, in a sense, logical because no formal rule is proposed in this NPRM nor cited in the IRFA. Nevertheless, the resolution of this proceeding has the potentiality to be as pervasive in impact as the refarming proceedings at

UHF and economically devastating to small licensees who are innocent bystanders. Accordingly, SBT strongly urges that this IRFA be amended to reflect compliance with the statutory requirements of RFA Section 603(a). Only by amending the IRFA can the Commission correct an error that potentially provides sufficient grounds for initiation of judicial review under the SBREFA which might delay timely resolution of the core issue in this proceeding, namely providing interference relief to public safety licensees.

The IRFA's Description of the Need for and Objectives of the Proposed Rules

The Commission has satisfactorily established in the NPRM that there is concern over the current and potentially ongoing problem of interference affecting 800 MHz public safety frequencies. SBT commends the Commission for recognizing this potential threat both to the effective provision of public safety services and to the life and limb of all public safety personnel, particularly “first responders.” However, we note that in the IRFA, the Commission defines its need for entry into this Proceeding based solely on the receipt of remediation proposals submitted by Nextel, Inc., (Nextel) and the National Association of Manufacturers and MRFAC, Inc. (NAM).⁴ In violation of the prescriptions of RFA Section 603(b)(1), Section A of the Commission’s IRFA omits any definition of the problem to be rectified by the regulation to be promulgated or an objective for any proposed rule.

The Commission only states that it has “tentatively concluded that spectrum reallocation would be in the public interest because it would solve current and future harmful interference to 800 MHz public safety communications.”⁵ This explanation falls far short of satisfying the

⁴ IRFA at A.

⁵ *Id.*

requirements of RFA Section 603(b)(1), and should be addressed by the Commission. SBT recommends that this oversight be amended in any subsequent supplemental IRFA or FRFA.

The IRFA's Description of Legal Basis

Again, in Section B⁶, the Commission omits to state the objectives of any proposed rule, as required by RFA Section 603(b)(2). SBT recommends that this omission be amended in any subsequent supplemental IRFA or FRFA. The Commission does appropriately cite its legal authority for proposing an eventual rulemaking.

The IRFA's Description and Estimate of the Number of Small Entities Affected

In this Proceeding, the Commission relies on outdated statistical support for its estimates, i.e., 1992 census data.⁷ We regret that during the comment period for this Proceeding we were unable to locate any newer estimates on the number of not-for-profit small organizations. However, to assist the Commission in its estimation efforts, SBT offers the following information:

The IRFA states that “‘small governmental jurisdiction’ generally means ‘governments of cities, counties, towns, townships, villages, school districts or special districts with a population of less than 50,000,’” and further states, “[a]s of 1992, there were approximately 85,006 such jurisdictions in the United States. This number included 38,978 counties, cities, and towns; of these, 37,566, or ninety-six percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the

⁶ IRFA at B.

⁷ IRFA footnotes 244, 246, 247, 252, 254 and 256.

85,006 governmental entities, we estimate that that 81,600 (ninety-one percent) [sic; should read “(ninety-six percent)”] are small entities.”⁸

Unfortunately, the collection of the 2002 *Economic Census* is currently being taken and is therefore unavailable. However, data from the 1997 Economic Census has been published and available since 1999. The Commission’s decision to forgo the readily available 1997 Economic Census information in favor of information outdated by at least an entire decade is nowhere explained. Whether the use of older information has compromised the accuracy of the Commission’s IRFA is a matter the Commission should address. SBT has reviewed the 1997 figures and provides the following updates to assist the Commission in determining whether its estimates are in fact accurate:

There were 87,504 governmental units in the United States as of June 1997. In addition to the Federal and state governments, there were 87,453 units of local government. Of these, 39,044 were general-purpose local governments—3,043 county governments and 36,001 sub-county general-purpose governments. The remainder, more than half the total number, comprised special-purpose local governments, including 13,726 school district governments and 34,683 special district governments.⁹ Of the 39,044 county and subcounty general-purpose governments, 37,546 served populations of 50,000 or less.¹⁰ This provides the same proportion of 96 percent as with the 1992 data. By the same logic, we can estimate that of the 87,453 local governmental entities, 83,955 are small entities—an increase over past FCC estimates of 2,355 small government entities.

⁸ IRFA at C.

⁹ U.S. Department of Commerce, Bureau of the Census, *1997 Economic Census*.

¹⁰ U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 2001*, Table 415: County, Municipal and Township Governments by Population Size: 1997.

Public Safety Radio Licensees. The Commission states in the IRFA¹¹ that there are 1,320 National Public Safety Advisory Planning Committee (NPSPAC) licensees. Because the Commission omits to cite the source of these figures in either the IRFA or the NPRM, we are unable to comment conclusively. SBT recommends that this oversight be amended in any subsequent supplemental IRFA or FRFA. However, we do question the methodology the Commission uses to develop a definition of small businesses directed specifically toward public safety licensees — i.e., likening them to radiotelephone companies.¹² In fact, although the Commission was driving toward a comparison in the IRFA, it omitted to refer its radiotelephone small business estimates back to the case of public safety licensees. To assist the Commission in its ongoing IRFA definitions and estimates, SBT provides the following information:

In January 1998, the National Institute of Justice estimated that there were 17,000 law enforcement agencies (not including medical examiners and coroners) in the United States, and that 95 percent [16,150] of these agencies employed fewer than 100 sworn officers.¹³ The report further noted that 75 percent employ fewer than 25 sworn officers.¹⁴

A companion study was conducted a year later, sponsored by the Public Safety Wireless Network, to analyze fire and emergency medical services (EMS) communications in a like manner.¹⁵ That report estimated that the combined local and state fire and EMS public safety community was nearly twice the size of the overall law enforcement community and comprised

¹¹ IRFA at C.

¹² *Id.*

¹³ *State and Local Law Enforcement Wireless Communications and Interoperability: A Quantitative Analysis*, National Institute of Justice Research Report NCJ 168961, January 1998, page 5.

¹⁴ *Id.*

¹⁵ *PSWN Program Analysis of Fire and EMS Communications Interoperability*, Public Safety Wireless Network, April 1999.

more than 36,000 agencies and 1.5 million uniformed personnel. Of those agencies, 80 percent were fire departments, 19 percent were EMS agencies, and the remaining one percent were specialized departments (e.g., airport or harbor fire and EMS departments) or state organizations.¹⁶ The report further estimated that 96 percent of the fire and EMS agencies in the United States [34,560] employed fewer than 100 uniformed personnel, and the vast majority of agencies (86%) employed fewer than 50 uniformed personnel.¹⁷

Therefore, based on a combination of these two studies, it can be estimated that there are about 50,710 small public safety entities (16,150 law enforcement and 34,560 fire/EMS) in the United States that employ fewer than 100 uniformed personnel.

As to how many of these small agencies might be affected by the instant Proceeding, we return to information contained in the two studies. The law enforcement communications study noted that of 1,334 agencies it surveyed, most had conventional analog systems and operated in the high VHF bands (73 percent). Agencies that reported plans to replace or upgrade their systems within 10 years [by 2007], comprised 46 percent of the total respondents, and indications were that although 800 MHz was used by less than one-quarter of law enforcement agencies, the number of agencies operating at 800 MHz would double, growing from 23 to 51 percent.¹⁸

The fire and EMS communications study similarly noted that of the 1,045 agencies it surveyed, the majority operated analog systems (79%), used conventional architectures (75%),

¹⁶ *Id.*, page 3.

¹⁷ *Id.*, page 4.

¹⁸ *Supra*, ¹³, pages ix-x.

and operated in the high-band VHF spectrum (74%).¹⁹ A majority (57%) of agencies planned to replace or to substantially upgrade their LMR systems in the next 10 years [by 2009], although nearly one-quarter of fire and EMS agencies did not know how they would fund their next LMR system. This funding uncertainty was more pronounced in smaller agencies and with fire departments that had volunteer personnel. The study determined that fire and EMS use of the 800 MHz frequency band would increase from 26% to 43%.²⁰

This Proceeding is captioned as an 800 MHz public safety matter. Applying the 800MHz adoption estimates of 51 percent to the 16,150 small law enforcement agencies (or 8,237) and 43 percent to the 34,560 small fire/EMS agencies (or 14,900), it can be estimated that 23,137 small public safety agencies may be affected by this Proceeding in terms of communications design, operations and anticipated expenditures for 800 MHz. Not all of these will be public safety licensees, given the use of multijurisdictional licenses, but it serves as an outside estimate. SBT urges the Commission to amend its IRFA to include an analysis of affected entities that more fully considers broadly available information from which to make estimates. A failure to use accurate figures in the IRFA is impermissible and may run afoul of the RFA itself.

Business, I/LT and SMR licensees. The Commission estimates in its IRFA that 2,100 Business and I/LT licensees, and 1,100 SMR licensees might be potentially affected by this Proceeding.²¹ Because the Commission omits to cite the source of these figures in either the IRFA or the NPRM, we are unable to comment conclusively. SBT recommends that this oversight be amended in any subsequent supplemental IRFA or FRFA. SBT nevertheless

¹⁹ *Supra*, ¹⁵, page 11.

²⁰ *Id.*, pages 11-12.

²¹ IRFA at C.

supports the Commission's conclusion that nearly all Business, I/LT and SMR licensees affected would be small businesses.

Communications Equipment Manufacturers. The following information is volunteered to assist the Commission with updated estimates. Citing 1992 census figures, the Commission estimated that there were 778 small entities (750 or fewer employees, per SBA regulations) out of a universe of 858 communications equipment manufacturers.²² Currently available Census Bureau data presents a significantly larger number, a universe of 2,021 communications manufacturers, of which at least 1,833 qualify as small businesses by the SBA standard.²³ (The 1999 Census Bureau data does not break down "employment size of enterprise" beyond 500 employees, so the actual number of manufacturers with fewer than 750 employees is unknown, and the 1,833 figure must serve as a low estimate.) SBT appreciates the Commission's dilemma in resolving out how many of these small businesses are likely to be involved with the manufacture of equipment for the 800 MHz band or equipment for other frequencies that might be affected by this proceeding. Nevertheless, the RFA requires the Commission to offer a reasoned analysis of potentially affected parties, and SBT suggests the Commission may wish to reconsider whether its present analysis complies with the dictates of the RFA.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

In the IRFA, the Commission states that the NPRM "does not propose a rule that will entail additional recordkeeping, and/or third-party consultation or other compliance efforts."²⁴ This is unsurprising because, as we have noted throughout these comments, the NPRM does not

²² *Id.*

²³ Department of Commerce, U.S. Census Bureau, Statistics of U.S. Businesses: 1999: Communications Equipment Manufacturing United States, U.S. Communications Equipment Manufacturing by Employment Size of Enterprise.

²⁴ IRFA at D.

in fact propose a rule. As this Proceeding develops and any substantive rule emerges, SBT recommends that Section D of this IRFA be amended in any subsequent supplemental IRFA or FRFA to reflect any compliance requirements and to specifically estimate the classes of small entities that may be affected and the skills necessary for any attendant reporting or recording, as required in RFA Section 603(b)(4).

Significant Alternatives and Minimization of Economic Impact

In the IRFA, the Commission states that “As an alternative to relocating Business, I/LT, and SMR systems, we will consider: (a) allowing the licensees of these systems to remain on the public safety channels, on a secondary basis, after the realignment plan is implemented, as proposed by Nextel; or (b) allowing Business, I/LT and SMR systems to remain in the 800 MHz band as proposed by NAM. We will also consider such alternatives as may be recommended in comments to the Notice. We will also evaluate whether the 700 MHz public safety allocation, though currently encumbered with television stations, can satisfactorily meet public safety’s spectrum needs.”²⁵

Again, the IRFA does mention alternatives, but they are alternatives to proposals *made to* the Commission and cited in the body of the NPRM. They are not alternatives to rules *proposed by* the Commission—because it has proposed no specific rule. RFA Section 603(c) specifically requires that alternatives be *described* in the IRFA. Therefore it is insufficient for the Commission to mention that alternative rules may be considered. Rather, it must describe those alternatives presently or previously considered. SBT recommends that Section E of this IRFA be

²⁵ IRFA at E.

amended in any subsequent supplemental IRFA or FRFA to reflect the requirements of RFA Sections 603(c)(1), (2), (3) and (4).

Federal Rules that Duplicate, Overlap or Conflict

The IRFA states that as to any Federal rules which may duplicate, overlap or conflict with the proposed rules in this Proceeding, there are “none.”²⁶ At the risk of becoming redundant, we acknowledge that there can be no regulatory conflict with a rule that has not been declared. SBT recommends that Section F of this IRFA be amended in any subsequent supplemental IRFA or FRFA to reflect the requirements of RFA Section 603(b)(5).

An NOI Is More Suitable Than an NPRM

SBT recommends that the Commission convert this NPRM to a Notice of Inquiry (“NOI”). The Commission’s NPRM seeks extensive comment on issue areas and technical matters and, in lieu of a formal rule, posits only one tentative conclusion, i.e., that “a restructuring of the 800 MHz public safety band may be the only long-term solution to the interference problem.”²⁷ The Commission itself acknowledges that “At present there is an insufficient record on which to base any immediate relief.”²⁸ In fact, in no less than 136 instances in the NPRM does the Commission request specific comments, technical evaluations and appraisals from commenters. These are valuable questions, and the Commission did an excellent job asking thorough and provocative questions. SBT looks forward to reading the comments submitted in response. Our appreciation of the Commission’s earnest desire to assist public safety is not diminished by our procedural criticisms herein. However, SBT feels that these sorts

²⁶ IRFA at F.

²⁷ NPRM at 88.

²⁸ *Id.*

of requests to the public are better suited for an NOI than for an NPRM. Nowhere in the NPRM does the Commission propose a specific rule. Furthermore, it is the established opinion of the Office of Advocacy of the SBA that when the Commission *does* propose specific rules after a nonspecific NPRM, it must complete a *supplemental* IRFA to comply with the RFA²⁹

The Commission should not adopt regulations without the necessary information. Because the purpose of an NOI is to gather information and intelligence about the scope of a problem, factors that contribute to a problem, the benefits or limitations of different regulatory alternatives and the different impacts of each alternative, an NOI should be used whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed.

Unless the Commission issues another rulemaking addressing specific rules, it would be adopting rules on which the public would not have had a chance to comment because the rules have never been seen by the public. This is not consistent with the Administrative Procedure Act or the RFA. Rather than go straight to a final rule, the Commission should convert this NPRM to an NOI and conduct a second NRPM at a later date. This will allow the Commission to receive comments in response to questions raised in this NPRM while providing small businesses the opportunity to comment on specific rules before they are adopted.

Conclusions

Notwithstanding the benevolent motivation of assisting public safety by means of this NPRM, the IRFA in this proceeding is significantly flawed and fails to meet the mandate of the

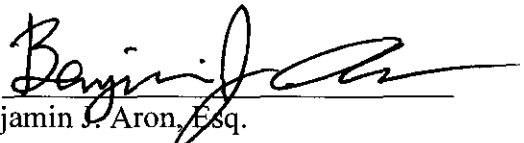
²⁹ Comments of the Office of Advocacy, U.S. Small Business Administration on the Initial Regulatory Flexibility Analysis of the Notice of Proposed Rulemaking, "In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets," MM 01-317 and "Definition of Radio Markets," MM 00-244, March 13, 2002.

RFA. Because of the generalized nature and lack of specific proposed rules in the NPRM and the IRFA, SBT recommends that the Commission convert the NRPM to a NOI. When the Commission proposes specific rules, it should conduct a supplemental IRFA to assess the impact on small businesses and to consider alternatives. Finally, the Commission should amend its current IRFA to reflect those short-comings identified herein in order to bring it into compliance with the requirements of the RFA.

Respectfully submitted,

Small Business in Telecommunications

Dated: May 6, 2002

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